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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD RAY HARRIS, Defendant and Appellant.	G040556 (Super. Ct. No. 08CF0039) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Defendant Ronald Ray Harris was charged by information with one count each of pimping a minor (Pen. Code § 266h, subd. (b)(1))[1] (count 1), pandering with a minor over the age of 16 by procuring (§ 266i, subds. (a)(1) & (b)(1)) (count 2), and unlawful sexual intercourse with a minor (§261.5, subd. (c)) (count 3). The People also alleged defendant had suffered a prior strike (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)). A jury acquitted defendant on counts 1 and 3, but found him guilty on count 2, pandering with a minor over the age of 16. The court found the strike allegation to be true, and sentenced defendant to the low term of three years, doubled because of the strike, for a total state prison term of six years. Defendant was granted 373 days of presentence custody credit comprised of 249 actual days and 124 days of conduct credit.

We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against his client, but advised the court no issues were found to argue on defendant's behalf. Counsel requested we conduct an independent review of the entire record. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was given the opportunity to file written argument in his own behalf, and he did so, filing 24 pages of written argument. We have reviewed all of defendant's arguments and conclude none of them are aguable. We have also conducted an independent review of the record and have not found an arguable issue. The judgment is affirmed.

FACTS

Sixteen-year-old A.J. began prostituting herself in San Diego in early 2007, working with a pimp she identified as Larry Lock. After working as a prostitute for a

[1] All further statutory references are to the Penal Code.

"couple [of] weeks," she stopped her prostitution when she was arrested on Harbor Boulevard in Santa Ana.

Shortly before October 2007, A.J. met defendant in San Diego. While walking on El Cajon Boulevard, A.J. had struck up a conversation with another woman. Later, defendant pulled up in a car, picked up both the other woman and A.J., and took them to a motel to take "sexy pictures" and "put them on a computer." Also at that time, defendant had a conversation with A.J. about engaging in prostitution. Defendant told her she "can have good things, the best things, and if [she] was with him and [she] did this, he would take care of [her] and a lot of other things he opportuned for."

Within a day or so, A.J. began prostituting herself again, working with defendant on El Cajon Boulevard in San Diego, to "turn tricks out and accept money from turning tricks out and bring it right back to [defendant]."

About one week after A.J. began working with defendant, he told her he had learned she was only 16. Defendant told A.J. she needed a fake identification card (I.D.), and that she would need to earn $300 through prostitution activities so he could get a fake I.D. for her.

A.J. was close to reaching the $300 goal for the I.D. when she journeyed with defendant to Santa Ana, ostensibly for defendant to return a rental car. After defendant returned the car, he and A.J. checked into a motel where defendant spent some time using his laptop computer to post pictures of A.J. on a website. Then defendant "had [A.J.] go early in the morning . . . to start working . . . ." Defendant and A.J. left the hotel and took a bus to Harbor Boulevard to an area "nationally known for prostitution" called the Harbor corridor where A.J. "work[ed] for a couple [of] hours" before she was arrested. Defendant stayed near A.J. while she was "working." A.J. engaged in three or four sexual acts for money before the arrest, and gave some of the money to defendant.

Santa Ana police officer Benjamin Romero was patrolling the Harbor corridor at "2:00 in the morning" looking for persons soliciting prostitution by "waving at

vehicles, stopping people on the street[,] [y]elling out to stop, you know, come over here," when he saw defendant and A.J. "waving at vehicles." Romero stopped the pair, and separated defendant from A.J. Romero asked A.J. "how old she was and what she was doing out on Harbor Boulevard at 2:00 in the morning." A.J. told the officer "she was acting as a prostitute and that she was working performing only oral sex for $20 an act." She also told the officer "that [defendant] was her pimp and that she gave him half of what she made and had been working for him for about a week – or actually for four days." According to A.J., when she and defendant were arrested, they were arguing because she had spent too much time in a motel with a "trick." The officer placed both A.J. and defendant under arrest.

DISCUSSION

Defendant makes about a dozen arguments in his own behalf. None have merit.

No Due Process Violation

First, defendant insists he was deprived of due process because all of the evidence of pandering involved matters which took place in San Diego County two and one-half weeks before the October 18 date alleged in the information. Not so. Defendant was convicted of pandering by procurement, defined as "[p]rocur[ing] another person for the purpose of prostitution." (§ 266i, subd. (a)(1).) A.J. testified that on October 18, she was "working" on Harbor Boulevard, with defendant acting as her pimp, had performed three or four sexual acts for money that morning, and shared the money with defendant. When the officer observed defendant and A.J., they were waving at cars on Harbor Boulevard. This evidence manifestly supported the charges in the information.

Substantial Evidence Supports the Verdict

Closely related to defendant's first argument, he asserts the verdict is not supported by substantial evidence. He again contends the evidence was about matters occurring two and one-half weeks earlier; the People failed to establish the corpus delicti; the case rested on the unreliable testimony of A.J.; and no third party witnesses or "Johns" testified. But the evidence recited in the previous paragraphs overcomes all of these concerns, and constitutes substantial evidence of the crime of pandering by procurement.

Specific Intent Was Established

Next, defendant contends the People failed to establish he had the specific intent to procure a prostitute. According to defendant, he was only shown to have had the intent to return a rental car. There is a split of authority about the intent required to prove pandering. (Compare *People v. Mathis* 173 Cal.App.3d 1251, 1256 [pandering under section 266i, subdivision (a)(2) (formerly section 266i, subdivision (b)) requires "specific intent to influence a person to become a prostitute"] with *People v. Montgomery* (1941) 47 Cal.App.2d 1, 16 ["The crime of pandering does not necessarily involve the question of specific intent. . . . [A]ll that is required . . . is the commission of any one of the acts set forth in section I thereof, and the only intent requried is that the act be voluntarily done or performed by the person charged, with full knowledge of its nature"], disapproved on a different point by *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 303, fn. 15, & *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2.) But under either line of authority, the evidence is overwhelming that defendant had the specific intent to procure A.J. for the purpose of prostitution.

Defendant Forfeited a Venue Challenge; the Charged Acts Occurred in Orange County

In another reprise of his first argument, defendant argues the evidence only supported a finding of pandering in San Diego County, outside the jurisdictional territory of the Orange County Superior Court. (See § 777.) But "a defendant who fails to raise a timely objection to venue in a felony proceeding forfeits the right to object to venue – either at trial or on appeal." (*People v. Simon* (2001) 25 Cal.4th 1082, 1104.) Here, defendant made no specific objection to the Orange County trial, and a simple not guilty plea to a felony charge is not an adequate objection to venue. (*Id*. at p. 1105.) Moreover, as discussed above, the evidence established the acts charged occurred in Orange County, so any objection to venue would have lacked merit.

Defendant Lacks Standing to Challenge the Grant of Immunity

A.J. testified after being granted use immunity under section 1324. Defendant asserts error because the court granted the People's section 1324 petition ordering A.J. to testify "without the presence or permission of the parent," and "bypassed the actual hearing to determine whether or not it would be against public interest for minor witness to testify." Before A.J. was called as a witness, the People advised the court that there had been an "understanding" there would be a "contractual agreement between the district attorney's office and the minor, along with her parent or guardian, that she would testify truthfully, if necessary, and in exchange for her truthful testimony that the district attorney's office would dismiss two petitions that she was facing in juvenile court." As it turned out, A.J.'s mother "chose not to come to court" and, without the mother's presence, the district attorney could not proceed on the agreement as planned. In lieu thereof, the People filed a motion for an order compelling testimony and granting immunity pursuant to section 1324.

The court appointed counsel to represent A.J., and shortly thereafter held the "hearing" required by section 1324. Neither party offered any witnesses, but A.J.'s

counsel argued "it would be contrary to public policy to compel the testimony of a minor without the involvement, without the consent of the guardian." Counsel did not provide any authority for that proposition, nor have we found any. More to the point, defendant lacks standing to make this argument. "'Such a situation involves an issue between plaintiff's witness and the State. The determination of such issue is not a matter about which the defendant may be heard to complain. Such an incident may provide argument as to credibility but it in no manner affects the rights of the defendant.'" (*People v. Clemmons* (1962) 208 Cal.App.2d 696, 700 [finding no due process violation in compelling minor to testify under grant of immunity].)

No Prosecutorial Misconduct

Next, defendant contends his trial was fundamentally unfair because his conviction was obtained by the prosecutor's knowing use of false testimony. He points to instances wherein A.J.'s trial testimony was at variance with her testimony at the preliminary hearing. But there is no evidence to suggest the prosecutor knew, either at the preliminary hearing or at trial, that A.J. was giving knowingly false testimony. Our comparison of the respective transcripts reveals that A.J. was a poor historian, with many lapses in her recall of the events about which she testified. But a witness with less than a perfect memory is a far cry from a prosecutor knowingly presenting perjured testimony. We reject defendant's assertion as being wholly unfounded.

No Instructional Error

Defendant next contends the court committed a host of prejudicial instructional errors.

1. *CALCRIM No. 226*

Defendant challenges part of CALCRIM No. 226, an instruction that lists various factors the jury may consider in evaluating the credibility of a witness. One of

those factors to consider is whether the witness was "promised immunity or leniency in exchange for his or her testimony." Defendant asserts the jury should have been told to consider whether the witness was promised immunity *and* lenience in exchange for the testimony. He claims the issue of immunity was given insufficient emphasis, being only one of many factors the jury should consider in evaluating credibility, and therefore it was "error to not cover the issue of immunity specifically."

Defendant also prefers former Ninth Circuit Criminal Jury Instruction No. 4.10[2] which advises the jury to view the testimony of witnesses receiving benefits from the government in exchange of testimony with "greater caution" than that of other witnesses. But defendant fails to cite any California authority that would require the court sua sponte to instruct the jury that testimony compelled under a grant of use immunity should be viewed with greater caution. Nor should such testimony necessarily be viewed with greater caution. After all, the grant of immunity does not immunize perjury. A witness compelled to testify under section 1324 "may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in . . . accordance with the order." (§ 1324.) The jury was fully informed that A.J. had been granted use immunity *and* she testified to her understanding that the district attorney had agreed to dismiss *two* juvenile cases pending against her in juvenile court if she testified against defendant. Further, relying on CALCRIM No. 226, defense counsel presented vigorous closing argument to the jury that A.J.'s testimony was not believable both because of her immunity and because the district attorney promised to dismiss her juvenile cases. CALCRIM No. 226 fully advised the jury on this factor of credibility. There was no instructional error with regard to CALCRIM No. 226.

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[2] Former Ninth Circuit Criminal Jury Instruction No. 4.10 is now a part of a broader Ninth Circuit Criminal Jury Instruction No. 4.9.

2. *Disapproved Cautionary Instruction Was Appropriately Not Given*

Citing *People v. Quock Wong* (1954) 128 Cal.App.2d 552, defendant contends the court should have instructed the jury to view A.J.'s testimony with caution; "that a charge of this character is easily made and difficult to disprove even if the defendant is innocent." (*People v. McGhee* (1954) 123 Cal.App.2d 542, 543.) In earlier times, now long passed, this type of cautionary instruction was typically given in cases involving sex offenses. (*Ibid.*) But three decades ago, the California Supreme Court ruled the instruction "is inappropriate in any context, and the further use of such language is hereby disapproved." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882.) The court did not err in failing to give the disapproved instruction.

3. *Actual Act of Prostitution Not a Necessary Element of Pandering*

Citing *People v. Hill* (1980) 103 Cal.App.3d 525 and *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, defendant asserts that an act of prostitution is a necessary element of the pandering offense, but the court failed to so instruct the jury. Defendant misconstrues the *Hill* and *Wooten* cases. In *Hill, supra*, 103 Cal.App.3d 525, the defendant testified he had procured a minor boy to satisfy a customer's request for a model to pose in the nude. If the jury believed this testimony, defendant could not be convicted of pandering because the boy would not have been procured to be a *prostitute*. The court held that it had a sua sponte duty to instruct the jury that "nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute." (*Id.* at p. 537.) Thus, it was the innocent *purpose* of the act procured that potentially took the defendant's conduct outside of the pandering statute, not the absence of an actual act of prostitution.

Likewise, in *Wooten v. Superior Court*, *supra*, 93 Cal.App.4th 422, defendant worked as a manager of a "strip joint" and was charged, inter alia, with

pandering by arranging private shows featuring nude women performing sexual acts on each other. Because the act procured by the defendant was not prostitution (no touching of customer), he could not be convicted of pandering. Here again, it was the innocent *purpose* of the act procured that exonerated defendant, not the absence of the act of prostitution. Defendant's argument here was put to rest in the case of *People v. Osuna* (1967) 251 Cal.App.2d 528. Like defendant, the defendants in *Osuna* contended that "the crime of pandering requires . . . proof of actual prostitution . . . ." (*Id*. at p. 531.) The appellate court answered: "We find this argument singularly specious." (*Ibid*.) So do we. The court properly instructed the jury on the definition of prostitution so the jury could understand the nature of the act the statute prohibits one from procuring. Actual performance of the act following the procurement is not an element of the crime.

4. *Instruction on Lesser Included Offense of Contributing to Delinquency of Minor Not Required Under the Facts of this Case*

Citing *People v. Mathis*, *supra*, 173 Cal.App.3d 1251, defendant asserts the court should have instructed the jury on the lesser included offense of contributing to the delinquency of a minor. (§ 272.) Assuming, without deciding, that contributing to the delinquency of a minor is a lesser included offense of pandering charged under section 266i, subdivision (b), there was no error in failing to give the instruction. "A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.] "'Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude [ ]'" that the lesser offense, but not the greater, was committed.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Here, the substantial evidence does not exist by which the jury could find defendant guilty *only* of contributing to the delinquency of a minor, but not guilty of pandering. There was no error in failing to instruct on the lesser included offense.

5. *Unanimity Instruction Not Required*

Defendant next contends the court erred by failing to give a unanimity instruction. He asserts some members of the jury could have relied upon the evidence of his activities in San Diego and while other jurors relied on his activities in Orange County, but there could be no assurance that all jurors based their decision on his Orange County activities. The contention lacks merit. Defendant was charged in count 2 of the information with the crime of pandering in *Orange County* on October 18, 2007. The jury was instructed that the charged crime occurred on or about October 18, 2007 (the date of defendant's arrest in Orange County). Thus, when the jury found defendant guilty of pandering "as charged in COUNT 2 of the Information," it necessarily concurred unanimously that the crime occurred in Orange County.

Record Inadequate for Speedy Trial Claim

Finally, defendant contends he was deprived of his speedy trial rights when the prosecutor dismissed the case when a trial continuance was denied, but then refiled the information on which he was eventually tried. The events surrounding the earlier filing and dismissal do not appear in the appellate record. Accordingly, we are unable to evaluate defendant's claim.

No Other Arguable Issue

In our independent review of the record we have not found any other arguable issue.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.